Protecting Posterity

Aviam Soifer*

Professor Arthur S. Miller, a master of the genre of creative constitutionalism, contributes an impressive example in his article, *Nuclear Weapons and Constitutional Law.* He advances several provocative arguments for possible constitutional limits on United States participation in the nuclear arms race; these arguments, undoubtedly, will stimulate much thought and development—unless a nuclear catastrophe intervenes.

Miller identifies a particular kind of complacency or cynicism among lawyers that allows many of us to assume that nuclear weapons simply are more powerful ways to kill people. It is surely important to challenge this assumption. On a more basic level, the threat of nuclear disaster invites all citizens—not merely lawyers and judges—to consider and to construe the text and meaning of the United States Constitution.

Law unquestionably serves as a secular religion in our democracy[1] and de Tocqueville's recognition that important political issues tend to

* Professor of Law, Boston University School of Law. This sketch is dedicated to my son Raphael Moshe. In one year he already has given his parents much to consider and to hope for the future. I would also like to express gratitude to the W.K. Kellogg Foundation. A Kellogg National Fellowship allowed me time to read and think about the issues explored below.

1. *See generally* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 170-88 (1969); M. LERNER, AMERICA AS A CIVILIZATION 442-43 (1957); Corwin, *The Constitution as Instrument and as Symbol,* 30 AM. POL. SCI. REV. 1071 (1936); T. ARNOLD, THE SYMBOLS OF GOVERNMENT 59-71 (1935) and Llewellyn, *The Constitution as an Institution,* 34 COLUM. L. REV. 1 (1934). Of course, much of Arthur S. Miller's impressive output is also directly on point.

As a young man, Abraham Lincoln urged other young men of Springfield, Illinois to let reverence for law "become the political religion of the nation. . . ." R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION 103 (1948). Alexis de Tocqueville, writing at the same time, but with a bit less reverence, called law in England and America "an occult science." A. TOCQUEVILLE, DEMOCRACY IN AMERICA 287 (P. Bradley ed. 1945).

end up in court is even more accurate today.[2] Our survival and that of our constitutional faith may depend on our willingness to consider the nexus between constitutional values and protecting our posterity.

In the past, slavery, civil rights and, more recently, abortion were the kinds of issues important enough to provoke many people to supplement the views of lawyers with their own constitutional judgments. To the horror of many of those learned in the law, precedential baggage has sometimes been jettisoned in the process. In trying times, judges and their colleagues sometimes behave more like strict constrictionists than strict constructionists.

Realistically, of course, no one today should entertain the notion that a legal challenge to the United States' role in the spread of nuclear weapons is likely to produce an enthusiastic response from the United States Supreme Court. Yet the threat of nuclear conflagration might be just the type of issue to move citizens to seek connections between constitutional language and contemporary values.

Just as it would be a mistake to leave constitutional values entirely to those with legal training, it would also be unwise to ignore the relevance of constitutional language and structure to such a debate. Plainly, as Chief Justice Taney's *Dred Scott* decision tragically demonstrated,[3] there are difficulties and dangers in constitutionalizing debate over public issues. But if the Constitution is relevant to such a debate, attention must be paid.

Miller's article suggests two different kinds of expansive interpretation of constitutional language. The first, more formal type concerns his arguments for the binding nature of international law and for the possible invocation of the non-delegation doctrine, which constitutionally limits the extent to which a branch of government may delegate its powers. Both these lines of analysis involve important legal arguments about the separation of powers in our national government. Miller is a

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2. A. TOCQUEVILLE, *supra* note 1, at 290. *See also id.* at 102-09. For an introduction to the voluminous recent literature on the litigiousness of Americans, and our propensity to resort to courtroom battles and judicial orders to resolve all manner of disputes, see J. LIBERMAN, THE LITIGIOUS SOCIETY (1981); Manning, *Hyperlexis: Our National Disease,* 71 NW. U.L. REV. 767 (1977).

3. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). For a general discussion of this case, its context and its consequences, see D. FEHRENBACHER, THE DRED SCOTT CASE (1978).

leading constitutional law expert on this topic; his thoughts on the subject are surely worthy of consideration. I leave it to others to debate how convincing Miller's specific arguments are.

What interests me more is Miller's second category of argument. Here he suggests that the phrase in the Preamble to the United States Constitution that concerns securing "the Blessing of Liberty to ourselves and our Posterity" may be a meaningful—perhaps even a legally enforceable — concept.

That the Preamble expresses a common theme is underscored when one considers the context in which early state constitutions as well as the federal document were composed and ratified. Those who precipitated a Revolutionary War and established a nation on an innovative constitutional scaffolding intended federal and state governments to provide for and protect not only themselves, but the generations to follow. The influential Virginia Declaration of Rights of 1776, for example, began with the following brave proclamation about equality and the rights of men:

> 1. That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, *they cannot, by any compact, deprive or divest their posterity;* namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing *and obtaining happiness and safety.*[4]

A Republican government was formed to secure the happiness and safety of the founders *and of their posterity.* As Thomas Jefferson argued, the living hold the earth in usufruct for future generations.[5] Each

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4. 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 49 (W. Swindler ed. 1979) (emphasis added). Virginia retains this language as Article I of her Bill of Rights.

5. Jefferson's assertion "that the earth belongs in usufruct to the living" appears in his letter to James Madison, written September 6, 1789 but not mailed until January 9, 1790. That letter, and the exchange it provoked between Madison and Jefferson, is discussed in illuminating fashion in A. KOCH, JEFFERSON AND MADISON 62-96 (1950). *See also* D. MALONE, JEFFERSON AND THE RIGHTS OF MAN 179, 291 (1951). Jefferson was sufficiently serious about the obligations of those living to those to follow that he proposed specific legal contraints to guard against waste and other violations of the natural law duty he believed to be owed by the present generation.

generation is morally bound to preserve the inheritance of those to follow. This concept of a responsibility to preserve the earth for the future was a central tenet in the consciousness and the constitution-making of the period. It does not take too much stretching across the intervening two hundred years to see how the early hope and effort of the founders to preserve and protect their political experiment for posterity is relevant to the threat of nuclear catastrophe today. Provoked in a positive sense by Miller's analysis, I now turn to an exploration of that idea, which I will call constitutional protection of posterity. My discussion is divided into three categories: Preamble, Protection, and Posterity.

Preamble

What legal weight should be accorded the Preamble to the Constitution? This question has seldom been explored in American constitutional law.[6] Like motherhood, the flag, and the Declaration of Independence, the Preamble is honored more by invocation than by observance. The language of the Preamble is generally relegated to misty patriotic incantations — appropriate for introductions at political gatherings and the socialization of immigrants, schoolchildren and the like, but not for the hardheaded business of those trained in the law. But when debate about constitutional text becomes particularly heated and spills out into the streets, as it did in the context of antislavery agitation prior to the Civil War, for example, citizens-in-the-street often begin to proclaim in plain language their understanding of the Preamble.[7] Indeed, this tendency helps to explain why the Preamble figures so infrequently in the constitutional discourse of judges, lawyers and legal scholars. If the public may parse the Preamble, it begins to appear hopelessly and dangerously open-ended.

The clear possibility of imminent nuclear danger is the appropriate occasion for reconsideration of what constitutional weight the Preamble should bear. A full exploration of the issue must await more time and

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6. A suggestive recent exception appears in Black, *A Round Trip to Eire: Two Books on the Irish Constitution,* Book Review, 91 YALE L.J. 391 (1981) Black's argument concerning application of the Ninth Amendment clearly relates to, and reinforces, the themes sketched in this essay.

7. *See, e.g.,* W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977) and my review at 56 TEX. L. REV. 1319 (1978).

space; however, Miller makes a significant start. Yet Miller may have dismissed the legal importance of the Preamble a bit too quickly; he also seems not to have weighed adequately the possibility of internally inconsistent commands within the Preamble itself. Miller points to the textual provision about securing the blessings of liberty not merely for ourselves, but also for our posterity. He then quickly moves to a discussion of the concept of natural justice. Thus Miller does not wrestle with other language in the Preamble that commits our government "to provide for the common defence" and to "insure domestic Tranquility." Those who would expand or maintain our nuclear arsenal could certainly argue that the task they have set for themselves is to carry out those directives.

The possibility that both sides might invoke the Preamble in a constitutional argument about nuclear weapons does not make it irrelevant. Internal contradition in the constitutional text is neither as silly nor as strange as it might first appear. Indeed, the phenomenon of conflicting claims, all premised on constitutional language, is a frequent, even prevalent mode of constitutional law argument. The possibility that the Constitution itself contains inconsistent commands and conflicting rights and obligations is an idea not yet adequately explored.[8] A reading of our constitutional history compels recognition of just such problematic interpretations. It also forces those would construe the Constitution's language to consider the structure as well as the words of the document.

In many ways, the Preamble is the obvious place to begin. Its clear indication of transgenerational concern should not be ignored. At a minimum, the Preamble suggests that constitutional meaning should be derived with an eye to the future as well as to the past. Brief consideration of both the specific language and the structure of the Constitution, as they pertain to the obligation of government to protect the populace, illustrates my point that the Preamble suggests the Constitution should be discussed as if posterity were eavesdropping.

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8. For useful initial forays, *see generally* Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978) and C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

Protection

Miller provides a summary of a few recent and controversial decisions by the United States Supreme Court which, taken together, suggest an ill-defined constitutional right to privacy and autonomy. Such a constitutional right, now generally conceded to be a right derived from a revised or revisited idea of substantive due process,[9] could conceivably be extended dramatically to encompass the family of man.

Such a concept of family exceeds the grand old American nuclear family and even the extended family, whose vital role in the American past was essential to the Court's decision in *Moore v. City of East Cleveland.*[10] It is too grandiose a gambit, however, to leap from the Court's groping efforts to define some right to intimate associations[11] to a claim of constitutional contraints that may be invoked to promote group survival.

This jump is troublesome for several reasons. First, most of the Court's recent decisions are premised on a highly individualistic notion of procreative and familial roles. Additionally, the "bad press" that protection of intimate relationships received from the public as well as from constitutional experts soon after its discovery by the Supreme Court makes this particular constitutional claim a somewhat shaky platform upon which to construct an edifice for constitutional protections.

Finally, it is somewhat anomalous to premise an argument advocating constitutional concern for future generations on decisions that are particularly troublesome precisely because, in invalidating state barriers to abortions, the Supreme Court appeared to ignore the future-oriented claim that could be made on behalf of fetuses. This claim implies that the fetus, more than the pregnant woman, is a direct link to future generations; it alleges that the state, as surrogate for and protector of the fetus, best represents posterity.

Needless to say, the nexus between the fetus and the future has

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9. *See, e.g.,* Moore v. City of East Cleveland, 431 U.S. 494, 502-04 (1977); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J. 920 (1973).

10. 431 U.S. 494, 503-06 (1977).

11. The most thoughtful effort generally to accept and to develop the implications of the new privacy may be found in Karst, *The Freedom of Intimate Association,* 89 YALE L.J. 624 (1980).

not been a central element of the debate swirling around abortion. But such a connection might be a way to rethink, perhaps even to begin to justify, some of the curious judicial line-drawing in the abortion decisions, even as it suggests new difficulties in *Roe v. Wade*[12] and its misnamed "progeny."

The "privileges or immunities" clause of the Fourteenth Amendment, though not mentioned by Miller, is perhaps more promising, in part, because the meaning of that clause has scarcely ever been explored. The United States Supreme Court vitiated any discernible original intent behind its words in the *Slaughter-House Cases*,[13] which narrowed this protection of the rights of citizens to redundancy and oblivion. But the reasons for disuse of the privileges or immunities clause since that 1873 decision go beyond the burden of distinguishing, overruling or ignoring the Court's dubious initial interpretation. They include the apparent limitation of the phrase to the protection of "citizens" and not — as with other fourteenth amendment protections — protection of all persons. Existing judicial constructions of the seemingly parallel privileges and immunities provision in Article IV of the United States Constitution also complicate new interpretations of the fourteenth amendment language. In recent years, however, a surprising number of constitutional scholars of divergent ideologies have suggested that the hour for privileges or immunities protection has come round at last.[14]

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12. 410 U.S. 113 (1973).

13. 83 U.S. (16 Wall.) 36 (1873).

14. *See, e.g.*, Kurland, *The Privileges or Immunities Clause: 'Its Hour Come Round at Last,'* 1972 WASH. U.L.Q. 405; J. ELY, DEMOCRACY AND DISTRUST 22-30, 98 (1980). It may be worth noting that Professor Kurland's literary reference is to William Butler Yeats's poem, *The Second Coming*, in which Yeats appears not entirely sanguine about that vision. In fact, the poem may be read as somewhat prophetic on the subject of nuclear annihilation. Perhaps Yeats suggests something emerging from the apocalypse, but he writes of a time when

> Things fall apart; the centre cannot hold;
> Mere anarchy is loosed upon the world,
> The blood-dimmed tide is loosed, and everywhere
> The ceremony of innocence is drowned;
> The best lack all conviction, while the worst
> Are full of passionate intensity.

W.B. YEATS, *The Second Coming*, THE COLLECTED POEMS OF W.B. YEATS 184 (De-

Although the idea that all citizens should share in the constitutional privileges or immunities enjoyed by each citizen is provocative in itself, it is even more so when future citizens are included in the constitutional equation. Yet the Fourteenth Amendment privileges or immunities clause was derived most immediately from the 1866 Civil Rights Act. It is relatively clear that the men of the 39th Congress sought to mandate government protection from grievous harms and to guarantee rights they deemed essential to security.[15] The notion that privileges or immunities has something to do with freedom to choose the means of individual survival, as well as the assurance of minimal personal and group security, merits further attention.

Even more promising, I believe, is the argument that the constitutional text and structure combine to impose a duty on government to guarantee a certain threshold of security to all citizens. This interpretation, while connected to what I suggested about the Preamble, relies primarily upon the package of constitutional amendments ratified in the wake of the Civil War. Elsewhere, I have sought to demonstrate that the framers of the Thirteenth, Fourteenth and Fifteenth Amendments intended to alter existing notions of federalism and to guarantee a range of basic individual rights.[16] They sought to narrow or to eliminate the gap — starkly illustrated for most of them by constitutional protection of slavery — between what they deemed to be natural rights not previously protected, and what the federal Constitution now should and could protect.

Those who wrote, passed, and ratified this second Constitution

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finitive ed. 1956). A "rough beast," with "gaze blank and pitiless as the sun," now "Slouches toward Bethelehem to be born." After "twenty centuries of stony sleep . . . vexed to nightmare by a rocking cradle," it is this rough beast's hour which is now "come round at last." *Id.*

15. For an elaboration of this theme, and its historical context, see Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History,* 54 N.Y.U. L. Rev. 651 (1979); *see also* Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds,* 80 MICH. L. REV. 462 (1982). Raoul Berger's rather vehement response to my article is in, *Soifer to the Rescue of History,* 32 S.C.L. REV. 427 (1981). For another recent statement of a viewpoint opposed to my own, see *dictum* concerning the negative Constitution in Bowers v. DeVito, 51 U.S.L.W. 2163 (7th Cir. Aug. 20, 1982) (Posner, J.).

16. Soifer, *supra* note 15, at 686-96, 700-06.

hoped that state governments would adequately protect the civil and political rights the federal Constitution now established. By constitutional amendment and by statute, they attempted to assure federal protection in the event that the states failed in their duty to guarantee these newly-recognized rights. To those who sought to constitutionalize the outcome of the Civil War, it was clear that allegiance to government compelled a reciprocal governmental duty to protect basic rights. As they articulated the promise of the second Constitution, they repeatedly included the safety and security of all inhabitants. If the states failed in their obligation to protect those within their borders, it was the federal government's duty to intervene to secure the basic rights of all.

Too frequently, the lawyer's stock-in-trade is a tendency to focus on a single word or phrase to construe a constitutional text. This technique often misses the central message of the constitutional medium. Charles Black made this point convincingly years ago, and it has been developed by several others since.[17] A single example, derived from the Fourteenth Amendment, will illustrate.

In recent years, and for very good reasons, we have devoted primary attention to the "equal" part of "equal protection." Many struggled valiantly, and struggle still, to determine when racial stereotypes and their ilk should be constitutionally forbidden. In this process, the "protection" element of the constitutional text often is ignored. A few scholars have begun to develop the theme of constitutional protection for rights or processes they regard as fundamental, such as the right to political participation and minimal social welfare.[18] Thus far, however, equality remains the dominant motif, and protection is seldom identified as an overarching problem.

I do not mean to suggest that protection is a self-explanatory term, nor that an inquiry about the concept will yield easy answers. Elsewhere I have begun to consider the two-edged nature of arguments about governmental duty to protect. The concept includes both the pos-

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17. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); Ely, *supra* note 9, at 73-104; Monaghan, *Of 'Liberty' and 'Property,'* 62 CORNELL L. REV. 405 (1977).

18. *See* Ely, *supra* note 9 (equality in the political process); Michelman, *On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7 (1969) (threshold of necessities).

sibility of paternalism, in a pejorative sense, and of parentalism, a more positive counterpart.[19] It can be demonstrated, I believe, that those who wrote and adopted both the initial Constitution and the constitutional innovations after the Civil War operated in contexts that encouraged them to envision something of each kind of protection, without distinguishing clearly between the two.

A right to basic protection can be turned on its head, of course, by those who assert that foreign domination constitutes the vital threat to American security. Even this claim does not easily or convincingly extend to a defense of nuclear weapons proliferation, however. The assertion that in protecting something, we must set in motion the means to destroy it, is familiar enough after Vietnam. By now, such familiarity should breed contempt, not nuclear arms.

My claim is that the threat of nuclear annihilation—like a board bashed across the muzzle of a mule—should be sufficient to get our attention. We may then begin to consider exactly what kinds of obligation to the population we consider essential to the constitutive core of our republican form of government. We will have to confront the vexing issue of how to include posterity in our own generation's calculations.

Posterity

To begin to grapple with the issue of how to deal with our issue, we must wrestle anew with a perplexing philosophic and practical problem, and with a dilemma that deeply concerned eminent American thinkers such as Thomas Jefferson and James Madison. Even to define posterity is a challenge, as Jefferson discovered when he set out to calculate the lifespan of a generation. He tried to use his generational concept to create a legal system to assure that the earth would belong to the living and their posterity, rather than be ruled by the dead hand of the past. Precision about generations was and remains terribly elusive, however. Therefore, Jefferson's more pragmatic friend, James Madison, argued that "the present generation is morally bound to respect the natural rights — the basic needs — of coming generations, however much positive laws in any given society may depart from the

19. N.Y. Times, Oct. 19, 1981, at B10, col. 6.

moral ideal."[20]

Concern for future generations was an integral part of constitution-making in the nation's formative years. Koch summarized her discussion of the exchange between Jefferson and Madison as follows: "In general, the fundamental features of the theory that proved acceptable to both Jefferson and Madison were forward-looking and generous in their regard for the liberty and welfare of generations to come in America."[21]

The difficulty of determining exactly what this concern entails remains with us. Neither rights theorists nor utilitarians have met the challenge yet. The nearly total absence of posterity in the calculus done within the school of law and economics is one of the most striking limitations of this new orthodoxy.[22] The challenge of somehow acknowledging and providing for the future is vital, however, and starkly presented through intensified awareness of nuclear terror.

Most judicial analysis employs present presumptions and fact-finding to determine something concrete about the past and to serve a remedial or punitive end. But in constitutional law, the perspective is more often both forward and backward looking. One can lose all sense of balance, of course, in such Janus-like contortions. Yet even self-proclaimed strict constructionists usually acknowledge that the Constitution is a document designed for the future, meant to create a structure for an ongoing Great Experiment. As Chief Justice John Marshall put it, the Constitution was "intended to endure for ages to come."[23]

Failure to heed this future-oriented aspect of American constitutionalism is commonplace. It is particularly glaring, for example, in the

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20. Koch, *supra* note 5, at 74.

21. *Id.*

22. For philosophic discussions about possible claims upon contemporaries by those to follow, *see, e.g.,* OBLIGATIONS TO FUTURE GENERATIONS (R. Sikora and B. Barry eds. 1978); Kavka, *The Paradox of Future Individuals,* 11 PHIL. & PUB. AFF. 93 (1981) and Parfit, *Future Generations: Future Problems,* 11 PHIL. & PUB. AFF. 113; B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

The best critical discussion I know about the generational problem in the context of the law and economics debate is found in Heller, *The Importance of Narrative Decision-Making: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development,* 1976 WIS. L. REV. 385, 459-68.

23. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

recent efforts by the Supreme Court to make proof of past discriminatory racial motivation a necessary precondition before courts may recognize violations of rights guaranteed by the Civil War Amendments. This generally serves, as a practical matter, to constitutionalize the *status quo*.[24] It appears to reject the vital combination of symbolic and pragmatic roles the Court often played in the past.

Virtually anything that exists is said to be legitimate under this approach. Existence is viewed as a race of life, which the Court deems to be a fair contest. The nuclear arms race may be perceived in much the same way. Legal protection can be invoked only upon a clear showing of overt, official and effective mistreatment. Victimization alone, even racial victimization, is not sufficient. Exceptions will be made only for those who can actually prove bad motive.

Since the central defense of the expansion of nuclear arms is defense — not only a proper motive, but even an admirable one — an actual constitutional claim that nuclear proliferation endangers rather than enhances the security of ourselves and our posterity appears doomed. If it ever got that far, the current Court would easily dismiss the argument as simply a matter of the claimants' perception of the problem.[25]

Such a response—the idea that any actual harm is simply a matter of one's own subjective perception — is a paraphrase of the way the Court answered the argument in *Plessy v. Ferguson*[26] that to require segregated streetcars was a denial of constitutional rights. Like racial stigma, the danger of nuclear conflagration can be passed over as some-

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24. For an initial stab at this theme, see Soifer, *Complacency and Constitutional Law*, 42 OHIO ST. L.J. 383 (1981). *See also* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

25. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978).

26. 163 U.S. 537 (1896). A disturbing echo of the reasoning in *Plessy* may be found in City of Memphis v. Greene, 451 U.S. 100 (1981), *reh'g denied*, 452 U.S. 955 (1981). Here, too, the United States Supreme Court seemed to believe that any stigma associated with blocking off a street where it traversed a black neighborhood, as it ran from a prosperous white neighborhood to a public park, was to be found only in the perception of the black plaintiffs. After all, Justice Stevens argued, the blacks who complained did not show that blacks ever sought to have streets blocked, only to be refused. Any disparate impact "could not, in any event, be fairly characterized as a badge or incident of slavery." *Id.* at 126.

thing merely in the eyes of the beholder. This is particularly true today, when the Social Darwinian notion of independent individuals freely choosing their own fate again dominates judicial interpretation of constitutional law. Only if we begin to explore and to heed the constitutional directive to protect our posterity, and begin to include future generations in our own constitutional calibrations, can we hope to make certain that the dreaded dead hand of the past does not clasp a future universe full of dead hands.

Exactly where greater recognition of the claims of posterity would lead constitutional law is unclear. It is uncommonly important, though, to consider the organic, direct connection of our founders to subsequent constitutionalists — including ourselves. In turn, we are inevitably the parents and preservers of our posterity. This continuity, and the goal of protecting posterity established in the constitutional framework, suggest that it is neither far-fetched nor unproductive to explore how constitutional values are relevant to the contemporary threat of immediate nuclear annihilation.

Conclusion

The practical visionaries of the past surely could not have anticipated our modern folly. Yet themes of optimistic anticipation and concern for future generations echo through the constitutional scheme they established. The words of 1787 and 1868 provide no crisp, clean answers to any cases and controversies that might be framed to challenge the spread of nuclear weapons. But they do bequeath a still, small call to reason and to hope — for ourselves and for our posterity.